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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 184.

THE STANDARD OIL COMPANY,
an Ohio Corporation,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio, and
JOHN J. CARNEY,
Auditor of Cuyahoga County, Ohio,
Appellees.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

REPLY BRIEF FOR APPELLANT.

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McAFEE, GROSSMAN, TAPLIN, HANNING,
NEWCOMER & HAZLETT,
Of Counsel.

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Appellee argues that, because no individual boat of Appellant, and no average number of its boats, was within any particular foreign state on each day of the tax year, Appellant's boats and barges never acquired a tax situs in any foreign state, but remained fully taxable in Ohio, the state of Appellant's domicile.

It is true that the record does not show that any individual boat, or any average number of individually changing boats, was within any particular foreign state on every day of the tax year. It does show, however, that the entire fleet of boats was used *habitually* and *solely* for the purpose of transporting crude oil from pipeline terminals on the lower Mississippi River to Appellant's river terminals on the Ohio River; that the great bulk of the

use was on three routings: Memphis, Tennessee, to Mt. Vernon, Indiana, Memphis, Tennessee, to Bromley, Kentucky, and Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky; that no part of this route mileage was in Ohio; and that only 1.27% thereof was in waters which even bordered on Ohio.

The record further furnishes alternative bases for apportioning the value of the fleet of boats among the various foreign states in which collectively all its habitual use occurred. Thus, Appellant's Exhibit 2 gives the mileage, and also the barrel mileage, of each boat on each route in each tax year, and also the total mileage and barrel mileage of the entire fleet on each route in each tax year. From these figures and the standard table of Coastguard Mileages, it would be a simple matter to calculate the mileage or the barrel mileage of the fleet in each state in each of the tax years in question, and to apportion the value of the fleet among the various states on the basis of such calculation.

As stated on page 22 of our main brief, we recognize that there is language in the *Miller* and *Northwest Airlines* cases indicating that even the habitual use disclosed by this record is not sufficient either to give jurisdiction to the foreign states to tax on an apportioned basis, or to deprive the domiciliary state of the jurisdiction to tax full value. However, as shown on page 23 of our main brief, these cases are factually distinguishable from the instant case, and the right to tax cars or boats, habitually used within a foreign state for an ascertainable proportion of their use, should depend on the reality of the protection and benefits actually received from each foreign state, and not on the accident of whether one individual car or boat, or an average number of individually changing cars or boats, was present in the particular foreign state on

every day of the tax year. Furthermore, as shown on pages 24 to 26 of our main brief, in the cases of *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899), *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905) and *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158 (1933), and also in the case of *Union Transit Co. v. Lynch*, 177 U. S. 149 (1900), which was not cited in our main brief, this Court sustained the right of a foreign state to levy an apportioned tax, or denied the right of a domiciliary state to levy a full tax, although the evidence of habitual use in a foreign state was certainly no stronger than in the instant case, and although there was no evidence whatever that any individual car, or any average number of changing cars were in the particular foreign state on every day of the tax year.

It may not be inappropriate to state that Kentucky, the state in which the greatest part of the use of Appellant's fleet occurred, asserts the right to levy an apportioned tax on the basis of habitual use of boats and barges in its waters, without regard to the presence of any individual boats, or an average number of boats, in the state on every day of the tax year. As set forth in Appellant's opening statement before the Ohio Board of Tax Appeals (R. 63), and as noted by the Supreme Court of Ohio in its opinion (R. 115), Kentucky in 1946 asserted a right to tax these boats for the years in question; and within the last few days, in a letter from the Special Counsel of its Department of Revenue, it has reasserted its right and policy to tax them.

That Kentucky's asserted right to tax does not depend on one individual boat, or an average number of boats, being within its borders on each day of the tax year is evidenced by the decision of the Kentucky Court of Appeals in *Reeves v. Island Creek Fuel & Transportation Co.*,

313 Ky. 400, 230 S. W. 2d 924 (1950), which was decided during the pendency of the instant case. In that case, the court held that Kentucky could assess a tax, apportioned on a mileage basis, against two boats and a fleet of barges owned by a Maine corporation, which were used to transport coal between Huntington, West Virginia, where the corporation had its principal place of business and extensive loading facilities, and Cincinnati, Ohio, where it had extensive docking and unloading installations. While the evidence showed that 94% of the route mileage was within Kentucky, and that the corporation had "mooring facilities" in Coal Haven, Kentucky, which were "used when the exigencies of navigation required," there was no showing that there were any boats in Kentucky on each day of the tax year. In rejecting the corporation's argument that the use of the boats in Kentucky gave no jurisdiction to tax, the Kentucky court stated:

"Appellee strongly insists that these tugs and barges have not acquired a taxable situs in Kentucky in that they are only transiently present and that the essential element of permanency is lacking. It is insisted that there are no termini; no particular destination or regular port of call in Kentucky; and that the time spent by appellee's barges and tugs in transit through Kentucky waters is sporadic and irregular. In one of the briefs it is said: 'To acquire such a situs the boats and barges must be permanently situated in the non-domiciliary State and permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.' True, the factors above mentioned do enter into the determination of taxable situs. The idea of permanency, with respect to personal property, seems generally to be, that for such property to acquire a taxable situs, it must have a more or less permanent location as distinguished from a transient or temporary one. However, per-

manency in the sense that it must be fixed like real property is not essential to the establishment of a taxable situs for personal property." It seems to be sufficient, when in the ordinary course of business, that property is present and being used and employed with a consistent continuity and not spasmodically and temporarily.

"Following this concept there seems to have evolved the idea of estimating, by some reasonable method of aliquot division, the situs of any particular part of a mass of property whenever the mass is being used in interstate business and it is impossible to assign a situs at large to it in entirety. Such method of determining the share of an interstate mass has been applied to a fleet of steamships, lines of railroad, and the mass of railroad cars."

It is significant that the *Reeves* decision was rendered after the *Northwest Airlines* case and the *Ott* case were decided.

Appellee also argues that the showing made by Appellant in the instant case is inadequate, because the record does not show either the actual number of individual trips taken by the boats in the tax years in question, or the exact number of days spent by each boat in each state. It is true that the record does not show these facts. After we had clearly shown the fact of habitual use of the fleet in foreign states, and the fact that none of its route mileage was in Ohio, we did not attempt to give evidence of every conceivable basis for apportioning the value of the fleet among the states in which it was habitually used. What we did was to select two bases of apportionment which seemed most applicable to boats used as these were, and which have been most frequently used by this Court in tax apportionment cases. These bases were actual miles of route, which is equivalent to track mileage in the rolling

stock cases, and barrel mileage, which is the equivalent of the car mileage basis often used in rolling stock cases. It seems to us that these bases of apportionment are clearly proper and adequate in the instant case.

Applying either of these bases of apportionment, the value of Appellant's fleet is allocable in its entirety to states other than Ohio as no part of either its route mileage or its barrel mileage was within Ohio. As pointed out on page 6 of our main brief, the only time any of the boats ever docked at an Ohio port was when a boat, after discharging its cargo at Bromley, Kentucky, occasionally stopped at Cincinnati for food, fuel or minor repairs, just as it did at other points on the river; and even on such sporadic stops, the boats were almost certainly not within the State of Ohio, because Kentucky extends all the way to low water mark on the Ohio side of the river, and, presumably, a boat would not be docked where it would be grounded.

In closing this reply brief, we wish to point out that Appellee has made no attempt to distinguish the case of *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905), which has long been regarded as the leading decision of this Court on jurisdiction to tax vehicles of surface transportation. As pointed out on pages 19 and 25 of our main brief, the *Union Transit* case is on all fours with the instant case except for the fact that it involved rolling stock rather than river boats. There was no evidence in the *Union Transit* case that there were any cars in each foreign state on each day of the tax year. All the records showed was that the fleet of cars were habitually used in various foreign states, that the use could readily be apportioned among the states on a basis equivalent to car mileage, and that on such basis only one to three percent of the use was within Kentucky, the domiciliary state. On

this showing, this Court held that 97 to 99% of the value of the fleet should be deemed to have a situs outside Kentucky and that Kentucky violated the due process clause when it attempted to tax this 97 to 99%.

In view of the decision in the *Ott* case that the rule of apportionment applies to river boats as well as to rolling stock, we submit that this Court should apply the *Union Transit* decision in the instant case, and hold that under the due process clause Ohio had no right to tax Appellant's boats and barges.

Respectfully submitted,

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